(2)

No. 87-34

In the Supreme Court of the United States

OCTOBER TERM, 1987

FERDINAND E. MARCOS AND
IMELDA R. MARCOS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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31PP

QUESTIONS PRESENTED

1. Whether a foreign state can waive head-of-state immunity for a former ruler.

2. Whether petitioners may assert privileges allegedly available under Philippine law as a ground for refusing to produce documents subpoenaed by a federal grand jury.

3. Whether petitioners may assert their Fifth Amendment privilege, despite a grant of act-of-production immunity, and refuse to turn over documents subpoenaed by a grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 817 F.2d 1108. The order of the district court (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1987, and the petition for a writ of certiorari was filed on July 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were held in civil contempt in the United States District Court for the Eastern District of Virginia for refusing to comply with a subpoena duces tecum issued by a grand jury. The court of appeals affirmed.[1]

1. Petitioners are the former President of the Philippines and his wife. In early 1986, Corazon Aquino replaced petitioner Ferdinand Marcos as President. Petitioners entered the United States on February 26, 1986, aboard a United States Air Force plane. They have been granted parole status in the United States pursuant to 8 U.S.C. 1182(d)(5). After petitioners left the Philippines, the Solicitor General of the Philippines filed criminal charges against them, alleging, inter alia, conspiracy and violations of the Anti-Graft and Corrupt Practices Act and Articles 210-221 of the Philippine Penal Code.

At the time petitioners arrived in this country, a federal grand jury in the Eastern District of Virginia was investigating possible corruption in arms contracts with the Philippines.[2] In January 1987, petitioners were each served with subpoenas compelling them to produce before the grand jury specified documents that they held in a custodial and individual capacity (E.R. 1-11).[3] Petitioners filed a motion to

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[1] The court of appeals stayed its mandate pending the filing of this petition. Pet. App. 10a.

[2] The investigation began in October 1984, while petitioner Ferdinand Marcos was still President of the Philippines (Pet. App. 19a).

[3] "E.R." refers to the Excerpts of Record filed in the court of appeals.

quash the subpoenas on the ground that they were shielded from compulsory process under the doctrine of head-of-state immunity and the privilege against compulsory self-incrimination in the Philippine and the United States Constitutions. On February 3, 1987, the Aquino government formally waived "any residual sovereign, head of state, or diplomatic immunity [petitioners] may enjoy under international and U.S. law * * * by virtue of their former offices in the Government of the Philippines" (Pet. App. 13a). Without appearing before the grand jury, petitioners submitted the documents required by the subpoenas to the exclusive custody of the district court pending "the ultimate judicial resolution of [petitioners'] claims of privileges and immunities with respect to th[e] documents" (E.R. 112-114).[4]

2. The district court denied petitioners' motion to quash the subpoenas. Pet. App. 11a. Upon the government's motion, the district court then gave petitioners act-of-production immunity under 18 U.S.C. 6002-6003 with respect to the production of documents other than Philippine government documents. When counsel for petitioners informed the court that petitioners would nevertheless withhold the documents from the grand jury (E.R. 229, 331), the court held petitioners in civil contempt pursuant to 28 U.S.C. 1826(a) and ordered that they be confined. The confinement order was stayed pending the resolution of petitioners' appeal. Pet. App. 11a-12a.

3. The court of appeals affirmed. First, the court rejected petitioners' claim that they were entitled to head-of-state immunity, holding instead that the

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[4] The district court sealed the documents, denying access to anyone until the outcome of this litigation (Pet. App. 3a n.*).

waiver submitted by the government of the Philippines should be given full effect. As the court explained (Pet. App. 4a-5a):

> Head-of-state immunity is founded on the need for comity among nations and respect for the sovereignty of other nations; it should apply only when it serves those goals. In this case, application of the doctrine [to petitioners] would clearly offend the present Philippine government, which has sought to waive [petitioners'] immunity, and would therefore undermine the international comity that the immunity doctrine is designed to promote. * * * [H]ead-of-state immunity is primarily an attribute of state sovereignty, not an individual right. Respect for Philippine sovereignty requires us to honor the Philippine government's revocation of the head-of-state immunity of [petitioners].

The court noted that pursuant to the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 32(1), 23 U.S.T. 3241, foreign states can waive diplomatic immunity for their diplomatic agents. It would be anomalous, the court concluded, "if a state had the power to revoke diplomatic immunity but not head-of-state immunity." Pet. App. 5a.

The court also rejected petitioners' claim that 28 U.S.C. 1782(a) forbids the government from compelling petitioners to give evidence to the grand jury in violation of the Philippine privilege against compulsory self-incrimination. The court noted (Pet. App. 7a-8a) that that statute applies only to testimony taken pursuant to letters rogatory issued by a foreign or international tribunal, while the contested subpoenas were issued as part of a grand jury in-

vestigation that began before petitioners arrived in the United States. The court found (Pet. App. 8a) that there was no evidence that the Philippine government issued letters rogatory or otherwise requested that the subpoenas issue.

Finally, the court of appeals held that the Fifth Amendment privilege against compulsory self-incrimination could not be invoked to block the production of documents despite the grant of act-of-production immunity, whether or not that immunity will shield petitioners from prosecution in the Philippines. The court reaffirmed its prior ruling in *United States* v. *Under Seal (Araneta)*, 794 F.2d 920, 925-928 (4th Cir. 1986), cert. denied, No. 86-172 (Oct. 6, 1986), that the "Fifth Amendment privilege against self-incrimination provides no protection from self-incrimination under foreign law." Pet. App. 8a.

ARGUMENT

1. Petitioners first contend (Pet. 6-15) that the current government of the Philippines cannot waive petitioners' head-of-state immunity. As petitioners concede, no other United States court has addressed the question whether a foreign state can waive head-of-state immunity for a former ruler (Pet. 7). The issue is therefore plainly not a recurring one. For that reason alone, petitioners' claim does not deserve the attention of this Court. In any event, the decision below is correct.

Petitioners cite no constitutional or statutory source for their claim of head-of-state immunity.[5] To the

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[5] We note at the outset that head-of-state immunity would not extend to petitioner Imelda Marcos. At most, she would be entitled to diplomatic immunity; petitioners do not claim

extent that head-of-state immunity exists, it is no broader than the sovereign immunity generally accorded foreign states. See Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev. 169, 171 (1986) (noting that the courts have not treated head-of-state immunity as distinct from sovereign immunity). Any immunity enjoyed by a present or former head of state inheres exclusively in the foreign sovereign, and not in the individual.[6] Restatement (Second) of Foreign Relations Law § 66, at 201 (1965). The recognition of foreign sovereign immunity is a matter of grace and comity on the part of the United States; it is not constitutionally mandated. *Verlinden B.V.* v. *Central Bank*, 461 U.S. 480, 486 (1983).[7] The question whether a particular sovereign is required to

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in this Court that diplomatic immunity cannot be waived by a foreign state. See page 7, *infra*.

[6] Individual officers of a foreign government may invoke sovereign immunity only for acts done in the exercise of governmental authority. *Underhill* v. *Hernandez*, 168 U.S. 250, 254 (1897). Thus, a former head of state has no immunity for acts undertaken for his private financial benefit. *Jimenez* v. *Aristeguieta*, 311 F.2d 547, 557-558 (5th Cir. 1962).

[7] Petitioners err in stating (Pet. 14) that the purpose of head-of-state immunity is to preserve the proper functioning of the foreign government. Rather, its purpose is to advance foreign relations by showing respect for the actions taken by friendly governments. Sovereign immunity, of which head-of-state immunity is a part, is founded solely on notions of comity. The cases cited by petitioners in support of their assertion have nothing to do with sovereign immunity, head-of-state immunity, or diplomatic immunity. See *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 745 (1982).

submit to the jurisdiction of the United States courts was until recently a matter committed to the Executive Branch, which conducts foreign relations (*id.* at 486); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945). In 1976, however, Congress defined the scope of sovereign immunity in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602-1611. Pursuant to that Act, there is no sovereign immunity "in any case * * * in which the foreign state has waived its immunity either explicitly or by implication" (28 U.S.C. 1605(a)).

Diplomatic immunity can also be waived. Although it has no constitutional or statutory basis, diplomatic immunity is recognized in international law. See Vienna Convention on Diplomatic Relations, *supra*. In the United States, it generally shields a foreign state's diplomats from criminal and civil liability for acts done in this country. But there is no question that the foreign state can waive diplomatic immunity, thereby subjecting one of its agents to the jurisdiction of the United States courts. *Id.* art. 32(1).

Since the government of the Philippines can waive sovereign immunity and diplomatic immunity, it likewise can waive head-of-state immunity. Petitioners advance no sound justification for treating head-of-state immunity differently from sovereign and diplomatic immunity. Accordingly, the court below correctly held that petitioners were not immune from giving evidence to the grand jury merely by virtue of their former status as President and First Lady of the Philippines.

Contrary to petitioners' claim (Pet. 7-8), recognition of the waiver filed by the Philippine government will not "undermine U.S. international relations and lead to attempted interference by other nations with

the immunities accorded under U.S. law to our own former heads of state." First, as the court of appeals observed (Pet. App. 5a), "[r]espect for Philippine sovereignty requires us to honor the Philippine government's revocation of the head-of-state immunity" for petitioners. International relations will therefore be advanced, not impeded, by accepting the waiver. Similarly, recognizing the decision of the Philippine government to waive petitioners' immunity can scarcely lead to foreign interference with the immunities of former United States Presidents. Instead, accepting the Philippine government's waiver simply establishes the precedent that waiver decisions are the prerogative of the government affected. Just as the Philippine government can decide whether petitioners should be granted immunity, so the United States government can decide whether former United States Presidents are to be granted immunity.[8] Petitioners do not explain their assertion (Pet. 8) that accepting the waiver could "embarrass the United States in its international relations [by denying] * * * flexibility to deal with unexpected shifts in foreign political alignments." We are aware of no potential "embarrassment"; the grand jury investigation that generated the disputed subpoenas was clearly not instigated by the current Philippine government, since the grand jury investigation was initiated in October 1984, while petitioner Ferdinand Marcos was still President. That investigation is not politically motivated; it is entirely independent of the political situation in the Philippines. The Department of Jus-

[8] Indeed, petitioners' position, that immunity decisions are for the state in which the proceeding is held, is far more likely to undermine any protections available to former United States Presidents.

tice, in conjunction with the grand jury, retains the discretion to choose which persons and actions should be investigated and prosecuted in this country. Recognition of the Philippine government's decision to waive any residual head-of-state or diplomatic immunity petitioners might otherwise have may facilitate an appropriately authorized domestic United States investigation, but the Philippine government certainly cannot either instigate or terminate such an investigation.

Finally, petitioners attempt to draw support for their claim of head-of-state immunity from cases in which a United States President sought to claim some sort of immunity. See, *e.g.*, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (immunity from civil liability predicated on official acts); *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977) (presidential privilege). But not even a former President of the United States enjoys the broad immunity claimed by petitioners. Indeed, as a general rule, our President must comply with subpoenas to produce relevant evidence in a criminal case. *Nixon* v. *Fitzgerald*, 457 U.S. at 760 (Burger, C.J., concurring); *United States* v. *Nixon*, 418 U.S. 683, 705-713 (1974) ("[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial" (*id.* at 713)). Clearly, petitioner Ferdinand Marcos is entitled to no greater immunity in United States courts by virtue of his position than is a President of the United States. In short, petitioners' former positions in the Philippines furnish no basis for their refusal to comply with the grand jury subpoenas.

2. Petitioners next contend (Pet. 15-18) that pursuant to 28 U.S.C. 1782, they may assert before the

grand jury the privilege against compulsory self-incrimination that is provided for in the Philippine Constitution. Section 1782, however, is wholly inapplicable to this case. As its title shows, that section relates only to "[a]ssistance to foreign and international tribunals and to litigants before such tribunals." It provides that a district court may order an individual to give testimony or evidence "for use in a proceeding in a foreign or international tribunal" pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or any interested person. In complying with such a district court order, "[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." By its plain terms, Section 1782 does not apply to subpoenas for documents to be used in a federal grand jury investigation. A federal grand jury investigation is not a "proceeding in a foreign or international tribunal." Section 1782 simply does not purport to allow witnesses summoned before a grand jury to assert privileges that may exist in some other country.

Petitioners incorrectly assert (Pet. 17) that the court of appeals interpreted the Mutual Legal Assistance Agreement (Pet. App. 15a-18a), to "by-pass" Section 1782. The Agreement, which was signed on June 11, 1986, by representatives of the United States Department of Justice and the Presidential Commission on Good Government of the Republic of the Philippines, establishes procedures by which the United States and the Republic of the Philippines may assist each other in their respective investigations regarding transactions between the Philippine government or its citizens and American companies

or citizens (Pet. App. 15a). It facilitates the sharing of evidence, an aim entirely consistent with Section 1782. But the existence of the Agreement does not render the federal grand jury investigation a sham or a tool of the Philippine government. The grand jury is conducting a criminal investigation into violations of this country's federal criminal laws. This investigation began in 1984, while petitioner Ferdinand Marcos was President of the Philippines. Moreover, as the court of appeals found, the grand jury subpoenaed the documents in petitioners' possession on its own initiative, not at the behest or suggestion of the Philippine government (Pet. App. 8a). Despite the protections against disclosure provided by Fed. R. Crim. P. 6(e) (prohibiting disclosure of matters occurring before the grand jury), petitioners assert (Pet. 15) that any documents they provide to the grand jury will be turned over to the Philippine government pursuant to the terms of the Agreement. That speculative assertion does not alter the legitimacy of the grand jury investigation.[9] In sum, Section 1782 has no application to this case and does not permit petitioners to assert before the grand jury privileges that are available under Philippine law.

3. Petitioners contend (Pet. 18-23) that act-of-production immunity is inadequate to protect them against the risk that the documents will be used against them in a prosecution in the Philippines. Last Term, this Court denied a certiorari petition filed by petitioners' daughter and son-in-law making the identical argument. *Araneta* v. *United States*, No. 86-172 (Oct. 6, 1986). There is no reason for a different disposition here.

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[9] The assertion is not only speculative; it also misreads the Agreement. See page 13, *infra*.

As in *Araneta*, the question whether the Fifth Amendment protects an immunized witness from testifying before a federal grand jury is not squarely presented here. Petitioners have not sustained their burden of showing that they face a "substantial risk" that the subpoenaed documents will be used in a prosecution in the Philippines. See *Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972) (finding no Fifth Amendment privilege in the absence of a substantial risk). Accord *In re Sealed Case*, No. 87-5208 (D.C. Cir. Aug. 7, 1987), slip op. 6-7. The Fifth Amendment only "protects against real dangers, not remote and speculative possibilities" (*Zicarelli*, 406 U.S. at 478 (footnote omitted)).

Petitioners argue (Pet. 19) that they face a greater risk of being returned to the Philippines than the Aranetas faced, because petitioners "are the principal targets of the Philippine prosecution." As we explained in our brief in opposition (at 7) in *Araneta* v. *United States*, *supra*, however, it remains the case that the United States has no present intention of returning petitioners to the Philippines against their will, and there is no extradition treaty between the United States and the Philippines that entitles that country to seek their return. Moreover, although the Aranetas are free to leave this country if they wish to do so, the United States has recently taken steps to restrict the ability of petitioner Ferdinand Marcos to leave this country voluntarily. On July 6, 1987, the Immigration and Naturalization Service issued a departure control order prohibiting Ferdinand Marcos from departing from the United States. On the same day, the INS imposed additional conditions on his parole status that require him to obtain

written permission before leaving the Island of Oahu. See App., *infra*, 1a.[10]

Petitioners also have failed to show that they face a substantial risk that the subpoenaed documents will be turned over to the Philippine government. Under the terms of the Mutual Legal Assistance Agreement, the United States is obligated to turn over documents only as permitted by the "law, practice and procedure[s]" of the United States. Pet. App. 16a.[11] The law of the United States includes rules protecting grand jury secrecy. See Fed. R. Crim. P. 6(e). There is no reason to believe that Rule 6(e) will be ignored. Petitioners have not sought the further assurance of a protective order. It is for the district court to determine, in the first instance, whether such an order would be appropriate in the circumstances of this case. The courts of appeals have consistently considered protective orders and rules governing grand jury secrecy to be sufficient to protect a witness who gives compelled testimony against the risk that the compelled testimony may be used in a foreign prosecution. See, *e.g.*, *United States* v. *Joudis*, 800 F.2d 159, 161-164 (7th Cir. 1986); *In re President's Commission on Organized Crime*, 763 F.2d 1191, 1199 (11th Cir. 1985); *In re Grand Jury Proceedings* (*Chevrier*), 748 F.2d 100, 104-105 (2d Cir. 1984); *In re Grand Jury Proceeding 82-2* (*Nigro*), 705

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[10] These new conditions were imposed in part because of a belief that petitioner was intending to leave the United States voluntarily, "in a manner which would be prejudicial to the interests of the United States." App., *infra*, 3a.

[11] The Agreement also provides that "[a]ll assistance by a requested state will be performed subject to all limitations imposed by its domestic law" (Pet. App. 17a).

F.2d 1224, 1227 (10th Cir. 1982), cert. denied, 461 U.S. 927 (1983) (collecting cases).[12]

In short, petitioners have not shown that they face a "substantial risk" that the subpoenaed documents will someday be used against them in a foreign prosecution. A lawful grand jury investigation may not be impeded unless concrete risks are identified. *Zicarelli* v. *New Jersey Investigation Comm'n, supra.* The act-of-production immunity will sufficiently protect petitioners' privilege against compulsory self-incrimination in all United States courts. On the record made by petitioners, no further protection is required.

Even if petitioners had met their burden of showing that they face a substantial risk of foreign prosecution in which their compelled disclosures may be used against them, the Fifth Amendment question does not warrant review by this Court at this time. The decision of the court below does not conflict with any decision of this Court. In *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52 (1964), on which petitioners rely, the Court held only that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law" (*id.* at 77-78). Although the Court noted in dicta that English courts had held that the privilege against compulsory self-

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[12] Moreover, as petitioners point out (Pet. 5, 16), the Republic of the Philippines also has a constitutional privilege against compulsory self-incrimination, which could lead to the exclusion of compelled evidence in a Philippine court. Therefore, even if there were to be a Philippine prosecution, and even if the subpoenaed documents were turned over to representatives of the Philippines, it is still open to question whether the documents would actually be used to incriminate petitioners.

incrimination protected against the risk of foreign prosecution (see *id.* at 58-63), the Court nowhere suggested that the Fifth Amendment protects persons like petitioners from giving immunized testimony before a grand jury because they might someday be forced to stand trial in a foreign country. Instead, the Court in *Murphy* carefully distinguished that case from the federal-state case before it (378 U.S. at 67); as the Court's discussion indicated (*id.* at 67-68), there are differences between the two cases that would justify *not* extending the privilege to protect against incrimination in a foreign prosecution.[13]

The only other circuit that has addressed the question has concluded, like the court below, that the Fifth Amendment does not protect a witness against the risk that his testimony may be used against him by a foreign government. See *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), vacated and dismissed as moot, 397 U.S. 96 (1970). The only state court to address the question has reached the same conclusion. *Phoenix Assurance Co.* v. *Runck*, 317 N.W.2d 402, 413 (N.D.), cert. denied, 459 U.S. 862 (1982). Three district courts have agreed with petitioners' position on the Fifth Amendment issue,

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[13] In arguing that the Mutual Legal Assistance Agreement will render a Philippine prosecution, if one occurs, a "joint venture" between the United States and the Philippines, petitioners assert (Pet. 25) that the decision below is in conflict with *Byars* v. *United States*, 273 U.S. 28 (1927), and *Lustig* v. *United States*, 338 U.S. 74 (1949). Petitioners' "joint venture" argument is incorrect, for the reasons noted, pages 10-11, *supra*. *Byars* and *Lustig* are simply irrelevant. Those exclusionary rule cases hold that evidence that is legally seized during a joint federal and state investigation is inadmissible in a federal criminal trial. Neither case purports to impose a rule of exclusion for a foreign court.

but those decisions have never been embraced by their respective circuits. See *Mishima* v. *United States*, 507 F. Supp. 131, 135 (D. Alaska 1981); *United States* v. *Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981); *In re Cardassi*, 351 F. Supp. 1080, 1085-1086 (D. Conn. 1972). Few courts have had to address the constitutional question, because the subpoenaed witness can rarely make the threshold showing of a substantial risk of a foreign prosecution that is required by *Zicarelli*. See, *e.g.*, *In re Sealed Case*, *supra*; *United States* v. *Joudis*, *supra*. In light of the absence of any conflict among the circuits on this issue and the infrequency with which the issue arises, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

SEPTEMBER 1987

APPENDIX

[SEAL]

U.S. Department of Justice
Immigration and
Naturalization Service

District Director

595 Ala Moana Boulevard
P.O. Box 461
Honolulu, HI. 96809

July 6, 1987

HHW 212.7-C

Mr. Ferdinand Marcos
2338 Makiki Heights Drive
Honolulu, HI 96822

Dear Mr. Marcos:

Pursuant to the authority vested in me as District Director of the Hawaii District Office of the Immigration and Naturalization Service, this is to notify you of the following additional conditions of your parole into the United States:

> You must obtain from the District Director in Honolulu written permission to leave the Island of Oahu by any means. In this regard you must submit a written request to the District Director at least forty-eight (48) hours in advance of your proposed departure. This written request must include your purpose of travel, your itinerary, all means of transportation from your Makiki Heights residence, including the person or entity from whom the craft is obtained, its registration numbers, the crew's identities, and the number and identity of your traveling party.

You may be required to furnish additional information.

These conditions are imposed upon you by the authority vested in me as District Director by 8 U.S.C. 1182(d)(5) and 8 C.F.R. 212.5.

Please be assured I will give any request you may make my utmost consideration.

Sincerely,

/s/ William W. Craig
WILLIAM W. CRAIG
District Director

[SEAL]

U.S. Department of Justice
Immigration and
Naturalization Service

District Director

595 Ala Moana Boulevard
P.O. Box 461
Honolulu, HI. 96809

July 6, 1987

HHW 215-C

Mr. Ferdinand Marcos
2338 Makiki Heights Drive
Honolulu, HI 96822

Dear Mr. Marcos:

The provisions of 8 U.S.C., Section 1185(a)(1) make it unlawful for any alien to depart the United States unless such departure is in conformity with the rules and regulations issued under that section. I now have reason to believe that you intend to depart from the United States, in a manner which would be prejudicial to the interests of the United States. I further have reason to believe that your departure from the United States would fall within 8 C.F.R., Section 215.3, a copy of which is attached, and is therefore prohibited. Consequently, in accordance with the authority vested in me under 8 C.F.R., Section 215.2 (a), a copy of which is attached, you are hereby ordered that you shall not depart the United States until such time as this order is revoked.

In conformity with 8 C.F.R., Section 215.4, you have a right to a hearing before a special inquiry officer (immigration judge) regarding this order. A copy of the regulations describing the hearing process and

your entitlement to representation during that process is attached.

Any such request for a hearing must be received by the undersigned at: 595 Ala Moana Boulevard, Honolulu, Hawaii 96813. If you do not make a timely request for such a hearing, this order shall become final fifteen (15) days from the date of service upon you.

Sincerely,

/s/ William W. Craig
WILLIAM W. CRAIG
District Director

Attachments

Service acknowledged

/s/ Ferdinand Emelio Marcos
FERDINAND EMELIO MARCOS
Date: 6 July 1987

I, however, take exception to the second sentence about having reason to believe that I intend to depart from the United States in a manner prejudicial to the the [*sic*] interests of the U.S. I have no such intention of departing without notice to the U.S.

(Signed)
FERDINAND MARCOS

8 C.F.R.

§ 215.2 *Authority of departure-control officer to prevent alien's departure from the United States*

(a) No alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States under the provision of § 215.3. Any departure-control officer who knows or has reason to believe that the case of an alien in the United States comes within the provisions of § 215.3 shall temporarily prevent the departure of such alien from the United States and shall serve him with a written temporary order directing him not to depart, or attempt to depart, from the United States until notified of the revocation of the order.

(b) The written order temporarily preventing an alien, other than an enemy alien, from departing from the United States shall become final 15 days after the date of service thereof upon the alien, unless prior thereto the alien requests a hearing as hereinafter provided. At such time as the alien is served with an order temporarily preventing his departure from the United States, he shall be notified in writing concerning the provisions of this paragraph, and shall be advised of his right to request a hearing if entitled thereto under § 215.4. In the case of an enemy alien, the written order preventing departure shall become final on the date of its service upon the alien.

(c) Any alien who seeks to depart from the United States may be required, in the discretion of the departure-control officer, to be examined under oath and to submit for official inspection all documents, articles, and other property in his possession which are being removed from the United States upon, or in connection with, the alien's departure. The depar-

ture-control officer may permit certain other persons, including officials of the Department of State and interpreters, to participate in such examination or inspection and may exclude from presence at such examination or inspection any person whose presence would not further the objectives of such examination or inspection. The departure-control officer shall temporarily prevent the departure of any alien who refuses to submit to such examination or inspection, and may, if necessary to the enforcement of this requirement, take possession of the alien's passport or other travel document.

§ 215.3 *Aliens whose departure is deemed prejudicial to the interests of the United States.*

The departure from the United States of any alien within one or more of the following categories shall be deemed prejudicial to the interests of the United States.

(a) Any alien who is in possession of, and who is believed likely to disclose to unauthorized persons, information concerning the plans, preparation, equipment, or establishments for the national defense and security of the United States.

(b) Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities of any kind designed to obstruct, impede, retard, delay or counteract the effectiveness of the national defense of the United States or the measures adopted by the United States or the United Nations for the defense of any other country.

(c) Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities which would obstruct, impede, retard, delay or counteract the effectiveness of any plans made

or action taken by any country cooperating with the United States in measures adopted to promote the peace, defense, or safety of the United States or such other country.

(d) Any alien who seeks to depart from the United States for the purpose of organizing, directing, or participating in any rebellion, insurrection, or violent uprising in or against the United States or a country allied with the United States, or or waging a war against the United States or its allies, or of destroying, or depriving the United States of sources of supplies or materials vital to the national defense of the United States, or to the effectiveness of the measures adopted by the United States for its defense, or for the defense of any other country allied with the United States.

(e) Any alien who is subject to registration for training and service in the Armed Forces of the United States and who fails to present a Registration Certificate (SSS Form No. 2) showing that he has complied with this obligation to register under the Universal Military Training and Service Act, as amended.

(f) Any alien who is a fugitive from justice on account of an offense punishable in the United States.

(g) Any alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court in the United States: *Provided,* That any alien who is a witness in, or a party to, any criminal case pending in any criminal court proceeding may be permitted to depart from the United States with the consent of the appropriate prosecuting authority, unless such alien is otherwise prohibited from departing under the provisions of this part.

(h) Any alien who is needed in the United States in connection with any investigation or proceeding being, or soon to be, conducted by any official executive, legislative, or judicial agency in the United States or by any governmental committee, board, bureau, commission, or body in the United States, whether national, state, or local.

(i) Any alien whose technical or scientific training and knowledge might be utilized by an enemy or a potential enemy of the United States to undermine and defeat the military and defensive operations of the United States or of any nation cooperating with the United States in the interests of collective security.

(j) Any alien, where doubt exists whether such alien is departing or seeking to depart from the United States voluntarily except an alien who is departing or seeking to depart subject to an order issued in extradition, exclusion, or deportation proceedings.

(k) Any alien whose case does not fall within any of the categories described in paragraphs (a) to (j) inclusive, of this section, but which involves circumstances of a similar character rendering the alien's departure prejudicial to the interests of the United States.

§ 215.4 *Procedure in case of alien prevented from departing from the United States.* (a) Any alien, other than an enemy alien, whose departure has been temporarily prevented under the provisions of § 215.2 may, within 15 days of service upon him of the written order temporarily preventing his departure, request a hearing before a special inquiry officer. The alien's request for a hearing shall be

made in writing and shall be addressed to the district director having administrative jurisdiction over the alien's place of residence. If the alien's request for a hearing is timely made, the district director shall schedule a hearing before a special inquiry officer, and notice of such hearing shall be given to the alien. The notice of hearing shall, as specifically as security considerations permit, inform the alien of the nature of the case against him, shall fix the time and place of the hearing, and shall inform the alien of his right to be represented, at no expense to the Government, by counsel of his own choosing.

(b) Every alien for whom a hearing has been scheduled under paragraph (a) of this section shall be entitled (1) to appear in person before the special inquiry officer, (2) to be represented by counsel of his own choice, (3) to have the opportunity to be heard and to present evidence, (4) to cross-examine the witnesses who appear at the hearing, except that if, in the course of the examination, it appears that further examination may divulge information of a confidential or security nature, the special inquiry officer may, in his discretion, preclude further examination of the witness with respect to such matters, (5) to examine any evidence in possession of the Government which is to be considered in the disposition of the case, provided that such evidence is not of a confidential or security nature the disclosure of which would be prejudicial to the interests of the United States, (6) to have the time and opportunity to produce evidence and witnesses on his own behalf, and (7) to reasonable continuances, upon request, for good cause shown.

(c) Any special inquiry officer who is assigned to conduct the hearing provided for in this section shall

have the authority to: (1) administer oaths and affirmations, (2) present and receive evidence, (3) interrogate, examine, and cross-examine under oath or affirmation both the alien and witnesses, (4) rule upon all objections to the introduction of evidence or motions made during the course of the hearing, (5) take or cause depositions to be taken, (6) issue subpoenas, and (7) take any further action consistent with applicable provisions of law, Executive orders, proclamations, and regulations.

§ 215.5 *Hearing procedure before special inquiry officer.* (a) The hearing before the special inquiry officer shall be conducted in accordance with the following procedure:

(1) The special inquiry officer shall advise the alien of the rights and privileges accorded him under the provisions of § 215.4.

(2) The special inquiry officer shall enter of record (i) a copy of the order served upon the alien temporarily preventing his departure from the United States, and (ii) a copy of the notice of hearing furnished the alien.

(3) The alien shall be interrogated by the special inquiry officer as to the matters considered pertinent to the proceeding, with opportunity reserved to the alien to testify thereafter in his own behalf, if he so chooses.

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